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No. 92-127

In The

Supreme Court of the United States

October Term, 1992

EQUIBANK AND EQUIMARK CORPORATION,

Petitioners,

v.

JAMES W. LASH, individually and on behalf of other Equibank employees and former employees similarly situated,

Respondents.

Petition For A Writ Of Certiorari To The Supreme Court Of Pennsylvania

PETITIONERS' SUPPLEMENTAL BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI AND REPLY TO RESPONDENTS' BRIEF IN OPPOSITION TO PETITION

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Pursuant to Supreme Court Rules 15.6 and 15.7, Petitioners file this Supplement Brief in Support of Petition for a Writ of Certiorari and Reply to Respondents' Brief in Opposition to Petition.

The court below held on three grounds that Section 514(a) of ERISA, 29 U.S.C. §1144(a), does not preempt Respondents' claim of breach of a "contract to form a plan." *Lash v. Equibank*, No. 128 Pittsburgh 1989 (Pa. Super. Sept. 18, 1989) ("*Lash*") at B8-12. Certiorari should be granted in this case because a conflict among the lower courts exists with respect to each of the grounds that formed the basis of the decision below. *See* Petition for a Writ of Certiorari (the "Petition") at 7-14. *Sanson v. General Motors Corp.*, 966 F.2d 618 (11th Cir. 1992), decided after the Petition was filed, further illustrates the conflicts among the lower courts and the confusion over the proper scope of ERISA preemption.

Respondents' Brief in Opposition to the Petition completely ignores the single most important reason for certiorari: protecting the broad scope of ERISA preemption from continued erosion arising from the unjustified extension of *Fort Halifax Packing Co. v. Coyne*, 482 U.S. 1 (1987). Instead, Respondents contend that conflicts identified in the Petition are not squarely presented because the decision below turned solely upon the determination that no ERISA benefit plan existed. This contention is flatly wrong. The issues identified in the Petition are properly before this Court.

1. The *Sanson* Case Demonstrates Continuing Confusion Over the Scope of ERISA Preemption.

The day after Petitioners filed their Petition, the United States Court of Appeals for the Eleventh Circuit decided *Sanson v. General Motors Corp.*, 966 F.2d 618 (11th

Cir. 1992), adding its voice to the conflict surrounding the proper scope of ERISA preemption. The *Sanson* plaintiff asserted a state law claim of fraudulent misrepresentation concerning pension benefits. Although the claim was asserted against the plaintiff's former employer, not the plan, the court of appeals held that the claim "related to" an ERISA plan and was preempted by Section 514(a) of ERISA under the following rationale:

> The existence of a pension plan subject to ERISA is a critical factor. . . . The measure of damages would be the amount of benefits Sanson would have received under the retirement plan. Such a determination demonstrates the relationship between the lawsuit and the special retirement plan.

Id. at 620. Thus, Respondents incorrectly claim that courts uniformly hold against preemption even where a one-time, lump-sum damage award will be measured by the terms of an employee benefit plan. *See* Opposition Br. at 9-13.

Sanson conflicts with the decision below on at least two grounds. First, unlike the court below, the *Sanson* court found preemption despite the fact that the claim was not made against a plan, but against plaintiff's past employer. *Compare Lash* at B11 *with Sanson*, 966 F.2d at 620. Second, *Sanson* held there was preemption because the damages claimed would be measured by reference to an ERISA plan, but the *Lash* court rejected this contention. *Compare Lash* at B12 *with Sanson*, 966 F.2d at 620. Accordingly, *Sanson* adds to the conflicts described in the Petition, *see* Petition at 9-10 nn.12, 14, and vividly illustrates the continuing nature of the conflicts among the lower courts on the important and recurring question of the proper scope of ERISA preemption.

2. The Three Conflicts Identified In the Petition Are Properly Presented to This Court.

Respondents do not dispute the existence of several substantial and direct conflicts among the courts regarding the proper analysis of the "relate to" standard of Section 514 (a) of ERISA.[1] Respondents contend, however, that the three conflicts identified in the Petition are not properly presented because the "sole issue adjudicated" below was that "where there is no plan in existence, there is no ERISA preemption." Opposition Br. at 8. Respondents are incorrect. Each of the rulings identified in the Petition formed a necessary part of the decision below.

The Pennsylvania court first found that no plan existed, but that did not resolve the case.[2] The court characterized Respondents' claim as one for breach of "a

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[1] Although Respondents do attempt to distinguish some of the cases identified in the Petition, these attempts are based on the contention that a plan admittedly existed in most of those cases. *See* Opposition Br. 8-11, 14. For purposes of the issues presented in the Petition, however, that factual difference is insignificant. The decision below, like the cases cited in the Petition, involved an analysis whether state law claims are preempted by ERISA. It is the soundness of these analyses that is the focus of the Petition.

[2] Petitioners have consistently contended that, regardless of the label applied to their claim, Respondents have alleged that they are entitled to damages consisting of benefits from an ERISA plan, albeit a plan that was never formally established or funded, and that ERISA therefore preempts Respondents' claims. *See* Petition at 14-15, *Lash* at B5, B8, Preliminary Objections at E4-5. Indeed, the trial court concluded that *Respondents'* contention was that "the defendants failed to pay a benefit provided for by an established in-place employee benefit plan." *Lash v. Equibank*, No. G.D. 88-19416 (C.P. Allegheny County) at C9-10. Furthermore, as described in the Petition, the proposed ESOP was inextricably linked to termination of the Pension

contract to form a plan," *Lash* at B10, but recognized that merely so labelling Respondents' claim did not dispose of the preemption argument. Consequently, the Superior Court expressly considered "[t]he question . . . whether or not the claims presented by Lash [as characterized by the court] are preempted by ERISA." *Lash* at B8. The court determined that claims for breach of "a contract to form a plan" were not sufficiently "related to" a plan so as to be preempted by Section 514(a) of ERISA. *See Lash* at B8-12. The correctness of the "relate to" holding is, therefore, properly presented to this Court. *See Raley v. Ohio*, 360 U.S. 423, 436-37 (1959) (There is "no question" that a federal claim is properly presented for this court's jurisdictional purposes if the court below passed on it.).

Three separate rulings formed the basis of Superior Court's "relate to" holding:

(1) A claim for a one-time, lump-sum damage payment, even though measured by the terms of the proposed ESOP and the size of the reversion from the Pension Plan, did not relate to an employee benefit plan (B12);

(2) The claims "are not made against Equimark or Equibank in their capacity as fiduciaries of any proposed plan, but rather are made against them as past employers" (B11); and

(3) The claims did not implicate certain core concerns of ERISA, *i.e.*, "the operation, establishment, or administration of an employee benefit plan." (B11)

The court below did not specifically identify any one of these rulings as dispositive of the "relate to" issue, and a

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Plan, a defined benefit plan, which involved special legislation amending ERISA. *See* Petition 15-16, nn.20, 22.

reversal of any one of these rulings could, therefore, change the conclusion that Respondents' claims are not preempted. Accordingly, the propriety of each of these rulings is fairly presented to, and considered by, this Court.

As demonstrated in the Petition, a substantial and direct conflict among the lower courts exists with respect to each of the rulings of the court below. The genesis of those conflicts is the attempt, by some courts, to expand upon the *Fort Halifax* decision as a means to limit the broad scope of ERISA preemption. This case presents an excellent opportunity to protect the scope of ERISA preemption on multiple grounds and to end the widespread misuse of *Fort Halifax*. A writ of certiorari should therefore issue to the Supreme Court of Pennsylvania.

Respectfully submitted,

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